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Court Split Over Wetlands Protections

By GINA HOLLAND
The Associated Press
Monday, June 19, 2006; 1:03 PM

WASHINGTON -- The Supreme Court clashed Monday on whether the government can extend protections for wetlands miles away from waterways, in its first significant environmental ruling under Chief Justice John Roberts.

Justices decided on a 5-4 vote, split along ideological lines, that regulators may have misinterpreted the federal Clean Water Act when they refused to allow two Michigan property owners to build a shopping mall and condos on wetlands they own.

But on a separate 5-4 vote, they refused to block the government from restricting access on distant wetlands.

Justices were so fractured that the main opinion by Justice Antonin Scalia only had the votes of four justices.

Roberts, one of those four, said that the result was confusing and that "lower courts and regulated entities will now have to feel their way on a case-by-case basis."

The court voided rulings against Keith Carabell and John Rapanos, who wanted to fill wetlands they owned near Lake

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St. Clair in Macomb County, Michigan. Carabell wanted to build condos on wetlands his late wife owned about a mile from the lake. Rapanos wanted to put a shopping mall on his property, which is about 20 miles from the lake.

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"The court is clearly troubled by the federal government's view that it can regulate every pond, puddle and ditch in our country," said Reed Hopper, a Pacific Legal Foundation attorney who represented Rapanos.

Timothy Searchinger, an attorney with Environmental Defense, said the Army Corps of Engineers will have to do more work to defend restrictions.

"There's going to be a lot of administrative headaches," he said. "Ultimately every water body that's protected today should still be protected."

Instead of ruling in the property owners' favor, as they requested, justices said lower courts must reconsider whether ditches and drains near wetlands are waterways.

The court's four most conservative members wanted a more sweeping ruling, clearing the way for development of land unless it was directly connected to waterways.

The court's four most liberal members said that such a ruling would reject three decades of practice by the Army Corps of Engineers and threaten the environment.

In the middle was Justice Anthony M. Kennedy.

In a sign of the division, justices spent nearly half an hour explaining their votes from the bench Monday. After Scalia announced the decision, Kennedy and Justice John Paul Stevens both took turns detailing their positions.

Kennedy wrote his own opinion to explain why he was not joining the main opinion. "Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular," he said. Scalia's opinion, Kennedy said, "seems unduly dismissive of the interests asserted by the United States in these cases."

Scalia had said the Corps of Engineers misinterpreted the term "waters of the United States."

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"In applying the definition to `ephemeral streams,' `wet meadows,' storm sewers and culverts, ... man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term `waters of the United States' beyond parody," he wrote.

The cases are Rapanos v. United States, 04-1034, Carabell v. Army Corps of Engineers, 04-1384.

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